

LOH (Migration) [2019] AATA 761 (4 January 2019)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Kok Leong Loh
CASE NUMBER:	1709757
HOME AFFAIRS REFERENCE(S):	BCC2016/3922513
MEMBER:	David Barker
DATE:	4 January 2019
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 04 January 2019 at 10:42am

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – compelling reasons not to apply timeframe requirements – unlawful non-citizen for 12 years – impact on the sponsor and her son – financial dependence – failure to test entitlement to family payments – decision under review affirmed

LEGISLATION

*Migration Act 1958, ss 65, 359AA
Migration Regulations 1994, Schedule 2, cls 820.211; Schedule 3*

CASES

*Babicci v MIMIA (2005) 141 FCR 285
MZYPZ v MIAC [2012] FCA 478
Waensila v MIBP [2016] FCAFC 32*

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Border Protection to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 22 November 2016 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(d)(ii) of Schedule 2 to the Migration Regulations. The delegate found that the applicant did not meet the timeframe requirements for the visa and there were no compelling reasons not to apply the requirements. Therefore, he could not meet an essential requirement for the visa.
4. The applicant appeared before the Tribunal on 25 October 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor and from two other witnesses, Mr Chung Wai Tak and Master Muoi Yun. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
5. The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.
6. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

7. BACKGROUND

8. The applicant is a national of Malaysia and is 44 years old. He first entered Australia in January 2004, as the holder of a Subclass 976 Electronic Travel Authority, permitting him to stay in Australia for up to three months. He became an unlawful non-citizen in the Australian community when this tourist visa expired in April 2004 and remained so until he was granted a bridging visa, in association with the current application for a partner visa, in November 2016. The applicant is the fifth eldest of seven children.
9. The applicant's sponsor was born in Malaysia and is currently 44 years old. She is also the fifth eldest of seven children in her family. Four of her siblings currently live in Singapore while the other two, and her parents, live in Malaysia. She reports that she shares a close relationship with her siblings and has weekly contact with her parents. The sponsor came to Australia in 2008 on a student visa. She subsequently formed a relationship with a Malaysian national who was a permanent resident of Australia and had a child, Wilfred, from that relationship. Wilfred is now eight years old. The sponsor then applied successfully for a Partner visa and was after that granted Australian citizenship in November 2015. She reports that her relationship with her previous partner, the biological father of Wilfred, broke down in August 2015.
10. The applicant claims he and the sponsor met at a Buddhist temple in Parramatta in August 2014 and that they commenced living together and commenced a de facto relationship in

October 2015, following the breakdown in the sponsor's previous relationship. They were married in March 2017.

11. In the Record of Decision, a copy of which the applicant provided to the Tribunal, the delegate found that the Schedule 3 criteria were applicable to the visa application, as they determined the applicant last held a substantive visa in April 2004, demonstrably more than 28 days prior to when he applied for the onshore partner visa in November 2016. The delegate was not satisfied the claimed duration of the parties' relationship, or the nature of that relationship provided a compelling reason to waive the Schedule 3 criteria.
12. The delegate was also not satisfied that the circumstances whereby the applicant did not hold a substantive visa at the time he lodged an application for a partner visa provide a compelling reason to waive the Schedule 3 criteria. Neither was the delegate satisfied that any impact upon the sponsor or her son, Wilfred, from the application of the Schedule 3 criteria warranted the waiver of the aforementioned Schedule 3 criteria.
13. Prior to the hearing the applicant provided information to the Tribunal including but not limited to the following: written submissions from his representative, a psychological report from Dr E. Kwok dated 16 October 2018, statutory declaration from the applicant dated 19 October 2018, identity documents, relationship statements prepared by the applicant and sponsor and witness support declarations.

14. **TRIBUNAL HEARING**

15. *Evidence of the applicant*

16. As to why he remained in Australia after his Tourist visa ceased in April 2004, the applicant said he did so because he found it fun to be in Australia and that he stayed because he had not had enough fun at the time his visa expired.
17. As to what steps he took to regularise his visa status after his Tourist visa ceased, the applicant said he took no steps because he was scared he would be required to depart from Australia if he got in contact with the Australian immigration authorities. As to why he waited over twelve and a half years before he sought to regularise his visa status in Australia, the applicant said that after he met the sponsor and wanted to marry her he thought he should apply for the Partner visa. He said that he would otherwise have just remained here for a few more years having fun before he went back home to Malaysia.
18. As to how he supported himself during the period he was an unlawful non-citizen in Australia from May 2004 to November 2016, the applicant said he worked because he had run out of the money he brought with him from Malaysia and as he wanted to stay in Australia, he had no other option but to find work. He conceded that he was throughout this period aware he did not have permission to undertake paid employment in Australia.
19. In response to the Tribunal's invitation that he identifies compelling reasons as to why the Schedule 3 criteria should not be applied to his partner visa application, the applicant made the following comments:
 - He concedes it was his fault that he remained in Australia unlawfully between 2004 and 2016.
 - Now he has a wife and a son and it is his responsibility to look after them. He said that circumstances have changed and that is why he applied for the Partner visa.
 - His previous migration agent did not explain to him well enough about terms such as the Schedule 3 criteria that is why he did not prepare his case about that and it is why he has now needed to come to the Tribunal.

- He and the sponsor have been living together for the past three years and she and her son really need him. He pays for the electricity and other bills and is their only source of financial support. They have current savings of around \$10,000.
 - He could not live without them and they could not live without him. They are now the purpose of his whole life.
 - Because the sponsor is not long out of her previous relationship and her son has developed a good relationship with him, he and the sponsor do not want to be separated from each other.
20. In relation to whether the nature of the applicant's relationship with the sponsor provides a compelling reason to not apply the Schedule 3 criteria, the applicant made the following comments:
- He wants to give her a better life and does not want her to be hurt or harmed.
 - They are planning to buy a home together.
 - They are happy and want to remain happy into the future.
21. In relation to whether the nature of the applicant's relationship with the sponsor's son, Wilfred, provides a compelling reason to not apply the Schedule 3 criteria, the applicant made the following comments:
- Wilfred gets on well with him and the applicant helps Wilfred with his homework and other aspects of his life.
 - He has not had a son before and Wilfred has become very important to him.
 - He does not want to be separated from Wilfred.
 - If there was not a father figure in the home, the family would not feel like a family anymore and growing up with a single parent is not the same as growing up in a full family.
22. In relation to whether the impact from a period of separation between the parties, provides a compelling reason to not apply the Schedule 3 criteria, the applicant made the following comments:
- The sponsor would feel like she has fallen from heaven to hell.
 - This is because the sponsor needs to take care of Wilfred and she would also need to work. She recently started working part-time and only needs to work part-time, because he is able to financially support her. It will be harder for her to continue to work part-time if he had to depart from Australia. Her job is at a Buddhist temple in the Illawarra region, where she works in the dining area. He drives her to work and then does voluntary work at the temple while she has her work shift. Sometimes she also travels to work with a friend. He has full time employment earning around \$1,000 net per week.
 - In the past she experienced pressure from work and this would cause her to become tired, which would in turn mean she did not have enough time to spend with Wilfred. This may cause her to get irritated with Wilfred.
 - If Wilfred was not monitored properly, he may turn into a bad child.
 - If he returned to Malaysia without the sponsor it may no longer feel like a relationship, it might feel like a broken relationship.

23. In relation to whether the sponsor's reliance on him because of any health conditions provides a compelling reason to not apply the Schedule 3 criteria, the applicant said that he really wants to stay in Australia so he can help the sponsor deal with the pressures in her life. He wants her not to be so busy or face the pressure that would be caused by his departure from Australia.
24. The Tribunal invited the applicant to comment on the report provided by Dr Kwok, after noting that this report appeared to indicate that neither he nor the sponsor nor Wilfred suffer from any diagnosed mental health conditions. The Tribunal also noted that whilst the report of Dr Kwok stated that there would be impacts from the period of separation on the sponsor and Wilfred, it was not clear that any such impacts would exceed their abilities to cope provided some support strategies are put in place. In response the applicant said there would be some huge impacts if he had to go back to Malaysia for a period of time. He said he really does not want his wife to experience more pressure because he is not here. He said that if he was not with her she may explode one day and he does not want to see that happen.
25. As to the situation if the sponsor and Wilfred were to accompany the applicant to Malaysia whilst an offshore partner visa application was processed from that location, the applicant said he thinks this will be unacceptable for Wilfred as English is his first language and he does not have good Chinese and Malaysian language skills. He thinks it will therefore be disruptive for Wilfred to accompany him to Malaysia for any extended period of time.
26. The applicant said he would also have no income if he had to return to Malaysia and that this would be a big problem for him. He conceded that he has both parents and a number of siblings who reside in Malaysia. He conceded his parents own their home and that he would be able to stay with them if he returned to his home country for a period of time. He said that some of his siblings work in the construction industry and that he worked in the same industry when he used to live in his home country.
27. The applicant said that a problem is that his passport expired some time ago and he is unsure if he would be given a further passport by the Malaysian authorities because he has been away from his home country for so long.

28. *Evidence of the sponsor*

29. The sponsor said she loved the applicant very much in the past few years; he has always been good to her and supported her in everything. He has encouraged her to have a good attitude and has provided her with financial support. Her son loves the applicant very much. She trusts the applicant which is something she has not found elsewhere. She said that her previous relationship was not good. She said she has no other family support in Australia and that her life changed for the better after she met and started a relationship with the applicant.
30. The sponsor said that she and the applicant are planning a better life for the future. She said that if the applicant had to go back to Malaysia it will be very distressing for her. She is worried how it would affect Wilfred, as they have not discussed with him that this is even a possibility.
31. In response to a question from the Tribunal the sponsor said that she and the applicant have savings of around \$10,000 towards a house deposit. She said that she receives around \$100 per week in child support from Wilfred's biological father and that Wilfred and his biological father have contact with each other on a weekly basis. She said that she does not receive family payments from Centrelink for Wilfred and has not applied for or tested her

entitlement for these or other such payments because she wants to wait until the applicant's visa difficulties are sorted out before she takes any such step.

32. *Evidence of Mr Chung Wai Tak*

33. Mr Tak said that he and the applicant have known each other for six years and that they met through their mutual interest in Buddhism. Mr Tak said the applicant and sponsor have a happy family and that if the applicant departed from Australia it would cause upset to the applicant as well as the sponsor and her child. Mr Tak said that maybe the sponsor would get depressed and develop psychological problems. He said that if this did happen it will be hard for the sponsor to get through such a difficult period and that this also may have an impact on Wilfred. Mr Tak said it would be difficult for a boy not to have the input of a positive father figure like the applicant and that this could affect the boy's education, character and entire future. Mr Tak said it would be best for the whole family if they did not have to be separated from each other for a period of time.

34. Mr Tak said that the applicant has made a contribution to Australian society through creating a harmonious family life for the sponsor and her child. He said that the applicant also volunteers at the Buddhist temple which is a further positive contribution he makes to society.

35. *Evidence of Master Muoi Yun*

36. Master Yun indicated that they are a priest at the Nan Tien Buddhist temple in Illawarra. Master Yun said that he knows the applicant from the voluntary work he does at the temple and that the applicant and sponsor have a very harmonious family in which their son is well behaved and gets good results at school. He said that it would be unfortunate if the applicant had to return to Malaysia for a period of time as this would leave the sponsor as the only person to look after her son. Master Yun said that the sponsor would have to go to work and may not be able to look after her son properly. Master Yun said if the boy grows up in a loving family environment, he will have a better chance to develop into a positive member of society.

37. **Particulars of information put to the applicant pursuant to s.359AA of the Act**

38. In order to provide the applicant with procedural fairness, the Tribunal put particulars of information to the applicant pursuant to s.359AA of the Act, first explaining to him that the Tribunal is required to invite him to comment on or respond to certain information which the Tribunal considers would, subject to his comment or response, be the reason, or part of the reason for affirming the decision under review. The Tribunal explained to the applicant it would invite him to orally comment on or respond to the information and that he could seek additional time to comment on or respond to the information.
39. The particulars of the information put to the applicant was that during the hearing, the sponsor gave evidence that she has yet to test her entitlement to receive family payments in respect of her son, Wilfred. The Tribunal explained that family payments are payments potentially made by the Commonwealth to Australian citizen parents of Australian citizen children.
40. The Tribunal explained to the applicant that this information is relevant as if the sponsor was entitled and was to receive family payments, this would improve her financial circumstances and thereby reduce any potential financial impacts arising from the applicant being required to depart from Australia for a period of time. The Tribunal explained that if it relies on this information it may find that the potential financial impact upon the sponsor and her son arising from the applicant being required to depart from Australia to apply for a Partner visa

from an offshore location do not provide a compelling reason to not apply the Schedule 3 criteria to the Partner visa application.

41. The applicant told the Tribunal he did not wish for further time to consider his response to this information and then told the Tribunal that whilst the sponsor could apply for family payments, it is not apparent they would be approved, or if approved whether the amount she would receive would be sufficient to support her. The applicant said that if he can stay in Australia, he can support the sponsor and work. He said this would mean he was paying tax and that the government does not need to financially support the sponsor and her son. He said this would be good for everyone and that he would like to remain in Australia and take responsibility for his family.

CONSIDERATION OF CLAIMS AND EVIDENCE

42. The issue in the present case is whether the applicant held a substantive visa at the time of her application or had applied within 28 days of the day his last substantive visa ceased and, if not, whether there are compelling reasons not to apply the Schedule 3 requirements.
43. In making its findings, the Tribunal has considered the documents contained in the Department and Tribunal files and oral evidence provided by the applicant, sponsor and witnesses at the hearing, along with the submissions and further documentary evidence provided following the hearing.
44. An applicant who is not the holder of a substantive visa at the time of application must meet certain criteria in Schedule 3 to the Regulations. With limited exceptions not relevant to this case, he or she must satisfy Schedule 3 criteria 3001, 3003, and 3004 unless the Minister is satisfied that there are compelling reasons for not applying those criteria: cl.820.211(2)(d).
45. It is not in dispute that the applicant in the present case did not have a substantive visa at the time of application. As the applicant did not enter Australia as the holder of a Subclass 995 visa or special purpose visa, the issue in the present case is whether the applicant satisfies the Schedule 3 criteria unless there are compelling reasons for not applying those criteria. These criteria are set out in the attachment to this decision.

Criterion 3001

46. In order to satisfy criterion 3001, the application for the visa must have been lodged within 28 days of the relevant day. The 'relevant day' is defined in 3001(2), as set out in the attachment to this decision.
47. The applicant's last substantive visa ceased on 6 April 2004 and he submitted the application for a Partner visa on 22 November 2016. Having regard to the definition of the relevant day in criterion 3001(2) the Tribunal finds that the applicant did not make the application within 28 days of the relevant day.
48. As the visa application was not made within 28 days of the relevant day, the applicant does not satisfy criterion 3001.

Compelling reasons

49. As the Tribunal has found that the applicant does not meet the relevant Schedule 3 criteria, it is required to consider whether there are compelling reasons for not applying the criteria.
50. The expression 'compelling reasons' is not defined for these purposes. However, the reasons should be sufficiently convincing to move the decision-maker to exercise its

discretion to waive the requisite criteria and the circumstances must be sufficiently powerful to lead a decision-maker to make a positive finding in favour of waiving the required criteria: *MZYPZ v MIAC* [2012] FCA 478 at [10]; *Babicci v MIMIA* (2005) 141 FCR 285 at [24]. Circumstances which constitute 'compelling reasons' for not applying the Schedule 3 criteria can arise at any time, including after the visa application is made: *Waensila v MIBP* [2016] FCAFC 32.

51. The Tribunal has also had regard to policy guidance in the Department's Procedures Advice Manual (PAM3) which states that the intent of the waiver provisions is to allow persons whose circumstances are genuinely compelling to regularise their status. The provisions are not intended to give, or be perceived to give, an unfair advantage to persons who fail to comply with their visa conditions or deliberately manipulate their circumstances to give rise to compelling reasons.

52. The Tribunal is not bound by Department policy. What amounts to compelling reasons in each case is a question of fact, having regard to all the circumstances of the case. To find whether compelling circumstances exist, the Tribunal is required to look at all of the circumstances of the case.

53. *Do the reasons for not holding a substantive visa provide a compelling reason to not apply the Schedule 3 criteria?*

54. The applicant made no submissions as to the circumstances whereby he did not hold a substantive visa at the time he lodged his application for a Partner visa in November 2016. The Tribunal has nonetheless considered the available evidence.

55. The applicant arrived in Australia in January 2004, on a Tourist visa which ceased three months later in April 2004. He unlawfully remained in Australia for over twelve and a half years before lodging the application for a Partner visa in November 2016. In response to a question as to why he did not depart from Australia when his Tourist visa ceased in April 2004, the applicant told the Tribunal he found it was fun to be in Australia and as he had not had enough fun by April 2004, he just stayed here. He said that when he realised his visa had expired, he was scared to approach the Australian immigration authorities because he thought that if he did so he would be forced to depart from Australia. He said that for this reason he decided to just not approach the Australian immigration authorities.

56. The Tribunal does not accept the circumstances whereby the applicant lacked a substantive visa at the time he applied for the Partner visa were beyond his control, or that they provide a compelling reason to not apply the Schedule 3 criteria.

57. *Does the duration of the parties' relationship provide a compelling reason to not apply the Schedule 3 criteria?*

58. The parties claim to have been de facto partners since October 2015 and to have then become spouses in March 2017. The Tribunal has not made any critical assessment of the relationship between the applicant and the sponsor and has accepted at face value the claims that the parties are in a genuine and continuing relationship. The applicant claims the length of their relationship and its genuine nature provide a compelling reason not to apply the Schedule 3 criteria.

59. The Tribunal considered the evidence relating to the Schedule 3 waiver and the length of the relationship. As has been discussed, the Tribunal takes at face value the parties have been in a genuine relationship for slightly over three years, since October 2015.

60. The Explanatory Statement accompanying the introduction of the Schedule 3 criteria stated that the inclusion of a 'waiver' provision was in recognition of the hardship that may result in circumstances where an unlawful non-citizen seeks to apply for a Partner visa, but would otherwise be forced to leave Australia and apply offshore. The waiver was introduced to provide flexibility for the Minister where compelling circumstances arise, but only where there are reasons of a 'strongly compassionate' nature. The Statement referred to the following circumstances as examples of where a waiver may be justified:
- there are Australian-citizen children from the relationship; or
 - the applicant and his or her nominator are already in a long-standing spouse (partner) relationship which has been in existence for two years or longer.
61. The Tribunal acknowledges either an Australian citizen child from the relationship or a longstanding genuine relationship, on their own, can be sufficient to establish a compelling reason. There is no child from the parties' relationship, however, the Tribunal acknowledges the applicant and sponsor have been married for around 18 months and that they claim they commenced a de facto relationship in October 2015. The Tribunal acknowledges that by this reckoning, their relationship can be regarded as long term. A long-standing relationship is one factor to be considered, but it does not inevitably result in waiver. The Tribunal notes a genuine relationship is the basic requirement for a Partner visa application, and the parties have failed to further satisfy the Tribunal that the longevity of their relationship is a compelling reason that should compel the Tribunal not to apply the Schedule 3 criteria.
62. *Does the close and supportive nature of the relationship provide a compelling reason to not apply the Schedule 3 criteria?*
63. The applicant and sponsor both emphasised the close and supportive nature of their relationship in their oral evidence during the hearing and the parties' statutory declarations, dated 19 October 2018 and 22 October 2018, also make a number of references to this issue. In this document the parties both emphasise the way their relationship developed when the applicant gave the sponsor emotional support during a difficult period in her previous relationship with Wilfred's biological father. They emphasise the positive family life that has developed since they entered into a committed relationship with each other and the beneficial impact this has had upon both the sponsor and her son, Wilfred. The applicant contends the nature of their relationship is such that it would be hard for them if he was to return to Malaysia for a period of time, as they would miss each other and feel sad.
64. The Tribunal accepts that the applicant and sponsor have developed a close and supportive relationship. However, the Tribunal is not satisfied that the fact that the parties are in a close and supportive relationship provides a compelling reason for not applying the Schedule 3 criteria.
65. *Does the impact of separation provide a compelling reason to not apply the Schedule 3 criteria?*
66. The parties gave consistent oral evidence that they have a close and supportive relationship and do not wish to live apart. They said it would be very stressful for both of them if the applicant had to lodge the Partner visa application offshore.
67. The Tribunal accepts that the applicant and sponsor have developed a close and supportive relationship. However, the basic requirement for the grant of a partner visa is that the applicant is the spouse or de facto partner of the sponsor. This, in part, requires the parties to be in a genuine, continuing and exclusive relationship. As this is the basic requirement for the grant of a partner visa, the Tribunal is not satisfied that simply the fact that the parties are

in a genuine and continuing relationship and do not wish to live separately provides a compelling reason for not applying the Schedule 3 criteria.

68. Any couple in a genuine relationship where an applicant is required to lodge a partner visa application offshore would likely face some emotional hardship. These are the circumstances that face all parties in a genuine relationship who are required to lodge a partner visa application offshore. The Tribunal acknowledges that living apart is clearly not the parties' preference. However, it is open to the applicant and sponsor to live together in Malaysia if they do not wish to live separately. It is also open to the sponsor to visit the applicant at regular intervals while he is offshore waiting for his Partner visa to be processed.
69. The parties can also maintain contact through social media. While the latter contact is not equivalent to direct contact, the Tribunal is not persuaded that it would provide no degree of meaningful contact between the parties and that it would not be of some emotional significance to the sponsor.
70. The Tribunal does not consider that the emotional difficulties that may arise for the parties during a separation while waiting for a visa application to be processed is a compelling reason not to apply the Schedule 3 criteria.

71. *Does the sponsor's reliance on the applicant because of any health problems provide a compelling reason to not apply the Schedule 3 criteria?*

72. The applicant gave evidence that the sponsor can be impacted by life pressures and that she would be sad and distressed if there was a forced separation arising out of any requirement that he depart from Australia to apply for a Partner visa from an offshore location. The sponsor gave consistent evidence with respect to this issue and also emphasised the lack of her alternate sources of support in Australia and the strain and pressure she would experience if she had to both work and care for Wilfred as a single parent.
73. The report of clinical psychologist, Dr Kwok, states that the sponsor did not report a history of mental health problems, but that the applicant had reported she was emotionally affected during the breakdown of her previous marital relationship. Dr Kwok reports that psychometric testing with the Personality Assessment Inventory reveals no evidence of the presence of clinical psychopathology affecting the sponsor, but that during stressful times in particular, she is prone to be somewhat self-critical, uncertain and indecisive. Dr Kwok reports that the sponsor's results on the Family Assessment Measure-III: Dyadic Relationship Scale were consistent with her positive description of her relationship with the applicant during her interview. The sponsor's results on the Adaptive Behaviour Assessment System suggests that she has specific strengths in skills needed for basic care in a home and living setting, as well as communication and decision-making skills needed for independent daily living, but may require support to assist her with engaging in and planning recreational and leisure activities.
74. In relation to the current state of the sponsor's mental health, Dr Kwok comments that she is presenting with a level of stress, anxiety and depressive symptoms that is reasonable for her circumstances and that the sponsor did not present with psychological symptoms that meet the criteria for a mental health disorder.
75. In relation to how the impact on the sponsor of the failure of her previous relationship and how this may in turn affect how she is impacted by a refusal of the applicant's current application for a Partner visa, Dr Kwok comments that support from the applicant during the breakdown of the sponsors previous relationship mitigated the negative impact experienced by the sponsor. Dr Kwok reports that whilst the sponsor would be able to distinguish feelings

of loss associated with the applicant's current visa application being refused with the loss associated with the breakdown of her previous marriage, her ability to cope with the applicant departing from Australia would be likely experienced differently by the sponsor, as she would not have access to a support person and will, therefore, be left to her own limited emotional and financial devices to care for both herself and Wilfred. Dr Kwok reports that the sponsor, in that eventuality, will benefit from counselling to assist her with adjustment and managing the loss. Dr Kwok notes that the sponsor's ability to find time to engage in counselling, either through private psychological therapy sessions or community family services, is questionable if she becomes a single parent. Furthermore, she is likely unable to afford private psychological therapy beyond the ten sessions that are available under Medicare.

76. In relation to whether the sponsor would be able to sufficiently care for Wilfred without the applicant's assistance; whether she would be able to find work; and whether she has support networks in Australia who could help her, Dr Kwok states that she does not believe that the sponsor would be able to sufficiently care for Wilfred without the applicant or other sources of support. Dr Kwok notes that the sponsor was working voluntarily, was not in receipt of Centrelink payments and was willing to look for paid employment. Dr Kwok notes that this would require the sponsor arranging childcare for Wilfred, as she did not think his biological father would be able to help care for Wilfred and that the sponsor would be at risk of social withdrawal in the event she was separated from the applicant, which could in turn affect Wilfred's socialisation opportunities.
77. Dr Kwok reports the sponsor may experience cultural pressure if she was to spend more than three months at any one time with the applicant in Malaysia, but that as the sponsor had reported no health or physical conditions, there is no indication that she will be at risk of physical harm if she were separated from the applicant for a significant length of time.
78. After reviewing the available evidence regarding the sponsor's reliance on support provided by the applicant, the Tribunal accepts that the sponsor's wellbeing has improved during the period she has been in a relationship with the applicant and that his emotional, financial and practical support has contributed to her current state of wellbeing. The Tribunal also accepts the sponsor is worried about the prospect of the applicant's current visa application being refused, necessitating him returning to Malaysia to apply for a partner visa from that location. However, in forming a view as to whether her reliance on the applicant's support provides a compelling reason to not apply the Schedule 3 criteria, the Tribunal has placed weight on Dr Kwok's assessment that she does not at the present time present with an acute mental health condition or have any reported history of mental health problems.
79. The Tribunal accepts Dr Kwok's assessment that the sponsor would experience difficulties, in relation to dealing with the impact of the applicant departing from Australia and would in that circumstance benefit from professional support. The Tribunal notes that the applicant's personality may constrain her accessing professional supports and that available supports may be limited in nature. The Tribunal is however aware that as an Australian citizen, the sponsor does have access to support through the Medicare system and that she can also test her entitlement to a range of income supports through Centrelink and the Family Assistance Office, which along with income from her current part time employment would cumulatively give her reasonable access to professional support through government, community and other sources. The Tribunal is not persuaded the applicant would not have access to a range of appropriate supports in the event she required professional support to help her manage the impact of the sponsor's temporary departure from Australia.
80. The Tribunal also accepts the sponsor has involvement with the local Buddhist community and is satisfied she would have access to support from this community in the event she was experiencing difficulty as a result of the applicant's temporary departure from Australia.

81. With respect to difficulty caring for Wilfred, the Tribunal acknowledges the sponsor's claim, as reported by Dr Kwok that Wilfred's father would be unable to assist because of his employment commitments. However, the Tribunal notes that it is also reported that Wilfred's parents have established good communication with each other and that his father has weekly contact with him and is paying \$100 per week child support. The Tribunal is not satisfied that in the event of the sponsor's circumstances changing it would not be possible for the sponsor to discuss this with Wilfred's father and request he provide further assistance, either financial or otherwise, in the best interests of their child. The Tribunal also notes that the sponsor has yet to test her entitlement to assistance from the Commonwealth in terms of both family payments and childcare rebates, both of which could provide a substantive level of assistance to her in the event she is in a single parent household for a period of time.
82. The Tribunal is not persuaded that the sponsor would be unable to manage her physical and mental health and her parenting responsibilities if the applicant is required to lodge a partner visa application offshore. The Tribunal is not persuaded that she would be unable to access appropriate professional support if required. The sponsor maintains a close relationship with her family offshore. There is no evidence to suggest she could not continue to do so in the event the applicant is offshore from Australia for a period of time. Further to this, there is no apparent reason why the applicant would not be able to provide emotional support to the sponsor through electronic means during any period of physical separation.
83. After considering the available evidence, the Tribunal is not satisfied the applicant has established the sponsor's reliance on him due to any health conditions or other reasons provides a compelling reason not to apply the Schedule 3 criteria.
84. *Does the potential impact on Wilfred from a period of separation from the applicant provide a compelling reason to not apply the Schedule 3 criteria?*
85. The Tribunal has considered the oral evidence and declarations from a range of sources which attest to the positive bond between Wilfred and the applicant and the positive role the applicant has in Wilfred's life. The Tribunal accepts this evidence. The Tribunal is not however persuaded that the impact from the applicant's departure from Australia for a period of time is such that it provides a compelling reason to not apply the Schedule 3 criteria.
86. The Tribunal accepts the evidence from the witnesses that Wilfred is a well-behaved boy, engaged effectively in his education and displaying no apparent behavioural problems. The Tribunal notes that testing of Wilfred's adaptive behaviour with Dr Kwok on the ABAS-III Parent/Primary Caregiver form shows that whilst he may benefit from increased emphasis on age appropriate leisure activities, he has particular strengths in the conceptual and practical adaptive skill areas, which indicates that Wilfred has the behaviours needed to communicate with others and engage in interpersonal interactions, apply academic skills required for his age, perform basic tasks of personal hygiene and function within a classroom.
87. The Tribunal accepts Dr Kwok's assessment that Wilfred would be emotionally impacted by a period of separation from the applicant, much as he would from a biological parent, due to the bond that has developed between them. The Tribunal accepts that any such emotional distress would need the support of the sponsor and that there would be clear benefit from explaining the circumstances to him in an age appropriate manner, including future contact plans during any anticipated period of separation. The Tribunal accepts Dr Kwok's assessment as to the important role Wilfred's biological father could play in assisting Wilfred manage the impact of a period of separation from the applicant and notes that whilst Dr Kwok was unable to interview Wilfred's biological father, the Tribunal is satisfied that the evidence before it indicates he is willing to have an ongoing positive role in Wilfred's life.

88. The Tribunal has considered the applicant's claims in relation to the difficulties Wilfred would experience as a consequence of he and the sponsor accompanying the applicant to Malaysia for the period required for an offshore partner visa application to be processed from that location. The Tribunal accepts Dr Kwok's assessment that there may be both positives and negatives associated with any such circumstance, as whilst language difficulties may impact on Wilfred, he would have significantly increased familial support and access to the culture of his parent's home country.
89. There is no claim before the Tribunal that the sponsor intends to accompany the applicant to Malaysia for the full period he would be there whilst an offshore Partner visa is processed. It would be open to her to make this choice, which in itself would have an impact on Wilfred, given his attachment and regular contact with his biological father in Australia. The Tribunal is not persuaded the time Wilfred may spend with the applicant and numerous other relatives in Malaysia would have a significantly adverse impact upon him.
90. The Tribunal acknowledges but is not persuaded by the claim that a boy spending a period of time in the primary care of his mother, albeit with regular access to his biological father and ongoing contact with his stepfather through direct and electronic means, is at an inevitably, significantly great risk of poor educational outcomes and maladaptive behaviour problems. In forming the view, the Tribunal is not disregarding the beneficial influence of parental love and support, but is rather aware that in modern Australian society, these important and beneficial influences on child development can be provided outside of purely a nuclear family structure.
91. After considering the available evidence, the Tribunal is not satisfied that a period of separation between Wilfred and the applicant, caused by the applicant's departure from Australia for a period of time, provides a compelling reason to not apply the Schedule 3 criteria to the visa application.
92. *Does the financial impact from a period of separation between the parties provide a compelling reason to not apply the Schedule 3 criteria?*
93. With regard to the financial impact from a period of separation between the parties, the Tribunal is not persuaded the available evidence demonstrates the sponsor and Wilfred would suffer severe financial hardship to the extent that would provide a compelling reason to not apply Schedule 3 criteria. The Tribunal accepts there would be some financial impact, however given the applicant's evidence the sponsor has recently gained some part time paid employment and has yet to test her entitlement to assistance from the Commonwealth such as a Centrelink payment, childcare rebate or family payments, the Tribunal is not persuaded the sponsor's overall financial circumstances would deteriorate to the level where there would be severe financial hardship. The Tribunal is also mindful that the sponsor receives regular child care payments from Wilfred's biological father and that it is also open to the applicant to seek paid employment in his home country and remit funds to the sponsor in Australia, during a period of separation, in accord with his stated ongoing commitment to the welfare of both the sponsor and Wilfred.
94. The Tribunal acknowledges the applicant's stated concern that he would not have employment if he returned to his home country for a period of time, however the Tribunal is not persuaded this concern provides a compelling reason to not apply Schedule 3 criteria. The applicant conceded he would be able to reside with his parents in the family home if he was to return to Malaysia and it is not apparent to the Tribunal why he would be unable to seek employment in his home country, especially as he has conceded he previously worked in the construction sector there and that some of his siblings also work in this sector.

95. *Does the applicant's positive contribution to Australian society provide a compelling reason to not apply the Schedule 3 criteria?*

96. The Tribunal accepts the applicant has made a contribution to Australian society through his voluntary work in the Buddhist community and through his contribution to the emotional wellbeing of Australian citizens such as the sponsor and Wilfred. However, the Tribunal is not persuaded this positive contribution is at a level that provides a compelling reason to not apply Schedule 3 criteria.

97. The Tribunal has also considered, but is not persuaded that the applicant's financial support of the sponsor and the potential reduction in support she may otherwise have sought from the Commonwealth through Centrelink and family payments provide a compelling reason to not apply Schedule 3 criteria.

98. *Does the behaviour of the applicant's previous migration agent provide a compelling reason to not apply the Schedule 3 criteria?*

99. The Tribunal has considered the evidence and submission in relation to the negligent behaviour of the applicant's previous migration agent. The claims are that the previous migration agent failed to pass on important correspondence from the Department associated with the partner visa application, along with other negligent behaviour, which resulted in the applicant not providing the Department with the level of information required regarding reasons as to why the Schedule 3 criteria should not be applied to his Partner visa application. The Tribunal has noted the information that the previous migration agent was, in November 2018, barred from registration by the Office of the Migration Agent Registration Authority and that this would support the claim as to why the Department was not provided with many claims or submissions in relation to issues arising from the Schedule 3 criteria.

100. However, the Tribunal is undertaking a merit review of the visa application, lodged in November 2016 and is not restricted to the information that was provided to the Department at the time of the delegate's decision in April 2017. The Tribunal is not persuaded by the claim that any negligent action or lack of proper representation from the previous migration agent provides a compelling reason to not apply Schedule 3 criteria. The Tribunal acknowledges that a compelling reason can arise at any time, but given the applicant has now had a full opportunity, with the assistance of the current authorised representative, to put before the Tribunal evidence in support of his claims, it is not apparent to the Tribunal why the actions of his previous migration agent provide a compelling reason to not apply the Schedule 3 criteria.

101. *Overall assessment*

102. The Tribunal has considered all of the claims made by the applicant. In this matter, the applicant has submitted the reliance of the sponsor and her son upon him for emotional, practical and financial support provide the primary compelling reasons why the Schedule 3 criteria should not be applied in his case. He also expresses concern as to how he would support himself in Malaysia whilst a Partner visa was processed. He also expresses concern as to the actions of a previous migration agent he was relying upon at the time of his visa application. The parties also emphasise the length and genuine nature of their relationship. The Tribunal has considered these and the other claims realised by the parties, both singularly and cumulatively, but is not satisfied they provide reasons for not applying the Schedule 3 criteria.

103. Based on the above and the other findings outlined in this decision, the Tribunal is not satisfied that there are compelling reasons for not applying the Schedule 3 criteria. Accordingly, the applicant does not meet cl.820.211(2)(d)(ii).

104. The Tribunal finds that the applicant does not meet the alternative criteria in cls.820.211(3)–(9) as his spouse has not died, he and his sponsor do not share custody, access or residence orders in respect of a child made by the Family Court, and the applicant has not made any claims of family violence.
105. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

106. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

David Barker
Member

ATTACHMENT - Extract from Migration Regulations 1994

Schedule 3

3001

- (1) The application is validly made within 28 days after the relevant day (within the meaning of subclause (2)).
- (2) For the purposes of subclause (1) and of clause 3002, the relevant day, in relation to an applicant, is:
 - (a) if the applicant held an entry permit that was valid up to and including 31 August 1994 but has not subsequently been the holder of a substantive visa — 1 September 1994; or
 - (b) if the applicant became an illegal entrant before 1 September 1994 (whether or not clause 6002 in Schedule 6 of the Migration (1993) Regulations applied or section 195 of the Act applies) and has not, at any time on or after 1 September 1994, been the holder of a substantive visa — the day when the applicant last became an illegal entrant; or
 - (c) if the applicant:
 - (i) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
 - (ii) entered Australia unlawfully on or after 1 September 1994;whichever is the later of:
 - (iii) the last day when the applicant held a substantive or criminal justice visa; or
 - (iv) the day when the applicant last entered Australia unlawfully; or
 - (d) if the last substantive visa held by the applicant was cancelled, and the Tribunal has made a decision to set aside and substitute the cancellation decision or the Minister's decision not to revoke the cancellation — the later of:
 - (i) the day when that last substantive visa ceased to be in effect; and
 - (ii) the day when the applicant is taken, under sections 368C, 368D and 379C of the Act, to have been notified of the Tribunal's decision.

3003

If:

- (a) the applicant has not, on or after 1 September 1994, been the holder of a substantive visa; and
- (b) on 31 August 1994, the applicant was either:
 - (i) an illegal entrant; or
 - (ii) the holder of an entry permit that was not valid beyond 31 August 1994;

the Minister is satisfied that:

- (c) the applicant last became an illegal entrant, or, in the case of a person referred to in subparagraph (b)(ii), last became a person in Australia without a substantive visa, because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with the conditions that apply or applied to:
 - (i) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (ii) any subsequent bridging visa; and
- (f) the applicant would have been entitled to be granted an entry permit equivalent to a visa of the class applied for if the applicant had applied for the entry permit immediately before last becoming an illegal entrant or, in the case of a person referred to in subparagraph (b)(ii), if the applicant had applied for the entry permit on 31 August 1994; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and

- (h) the last entry permit (if any) held by the applicant was not granted subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.

3004

If the applicant:

- (a) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
- (b) entered Australia unlawfully on or after 1 September 1994 and has not subsequently been granted a substantive visa;

the Minister is satisfied that:

- (c) the applicant is not the holder of a substantive visa because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with:
 - (i) the conditions that apply or applied to:
 - (A) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (B) any subsequent bridging visa; or
 - (ii) the conditions that apply or applied to:
 - (A) the last of any substantive visas held by the applicant (other than a condition of which the applicant was in breach solely because the visa ceased to be in effect); and
 - (B) any subsequent bridging visa; and
- (f) either:
 - (i) in the case of an applicant referred to in paragraph (a) — the applicant would have been entitled to be granted a visa of the class applied for if the applicant had applied for the visa on the day when the applicant last held a substantive or criminal justice visa; or
 - (ii) in the case of an applicant referred to in paragraph (b) — the applicant would have satisfied the criteria (other than any Schedule 3 criteria) for the grant of a visa of the class applied for on the day when the applicant last entered Australia unlawfully; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) if the last visa (if any) held by the applicant was a transitional (temporary) visa, that visa was not subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.